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**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

Enrique Lozano,

Plaintiff,

v.

Julio Yee Cabrera; Enrique Wong
Vazquez; Beamspeed, LLC, an
Arizona Limited Liability
Company; and Does 1-10,

Defendants.

Case No. 14CV0333-JAH-RBB

Complaint Filed: February 12, 2014

**DEFENDANTS JULIO YEE
CABRERA AND ENRIQUE WONG
VAZQUEZ' MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF MOTION FOR
SANCTIONS UNDER FRCP, RULE
11**

Date: June 22, 2015

Time: 2:30 PM

Courtroom: 13B

Judge: Hon. John A. Houston

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ISSUE PRESENTED

Under Federal Rule of Civil Procedure, Rule 11, the trial court may sanction any party that files a pleading for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation,” of if the “the claims, defenses, and other legal contentions” are unwarranted under existing law. Here, Plaintiff and his attorneys have filed and maintained an Americans With Disabilities Act lawsuit against Defendants despite the existence of a Stipulation for Dismissal and Order that resolved an essentially identical 2001 ADA lawsuit involving the same parties, and which gave that federal district court continuing jurisdiction “over all disputes . . . arising out of” the 2001 settlement agreement.

Does the conduct of Plaintiff Lozano and his attorneys in filing and maintaining this lawsuit (seeking “new” damages and attorney’s fees) rather than filing a motion in the 2001 Action to enforce the terms of the 2001 Settlement Agreement rise to the level of a FRCP, Rule 11 violation justifying the imposition of monetary sanctions against them?

SUMMARY OF MOTION

Defendants Julio Yee Cabrera and Enrique Wong Vasquez (collectively, “Defendants”) bring this motion for sanctions under Federal Rule of Civil Procedure, Rule 11 against Plaintiff Enrique Lozano and his attorneys of record in this case for their filing and maintenance of this Action in violation of a Stipulated Order of this Court following settlement of an almost identical 2001 lawsuit Plaintiff Lozano filed against these same Defendants involving the same purported violation of the Americans With Disabilities Act (“ADA”). The 2001 Stipulated Order gave the court overseeing Lozano’s 2001 lawsuit continuing jurisdiction to resolve all disputes arising from the Settlement Agreement that resolved the 2001

lawsuit. Thus, Lozano's property remedy for any purported ADA violation on the subject property (as alleged in his 2014 Complaint in this lawsuit) was to file a motion to enforcement the Settlement Agreement in the 2001 Action, not to file the present lawsuit. Lozano's decision to file and maintain the present lawsuit arises from his desire to obtain additional monetary damages and attorney's fees for the same purported ADA violation he sued on in 2001.

Lozano's Complaint was improperly filed in light of the 2001 Stipulated Order & Settlement Agreement. When Lozano and his attorneys maintained the present lawsuit --- despite being reminded of the 2001 Stipulated Order --- and when they played "hide the ball" by refusing to provide the only existing copy of the 2001 Settlement Agreement to Adams, their misconduct rose to the Level of a Rule 11 violation.

Given that Plaintiff's filing and maintenance of this entire lawsuit has been frivolous, Defendants seek the recovery of their entire attorney fees and costs in defense of this lawsuit, which total \$27,805.00. As referenced herein and in the Declaration of William A. Adams, these fees and costs were caused for the improper purpose of harassing Defendants and delaying the Court from taking the matter under its continuing jurisdiction over all disputes arising out of the 2001 settlement agreement, and by needlessly increasing Defendants' cost of litigation, in an effort to coerce Defendants to pay an unjustified monetary settlement.

STATEMENT OF FACTS

A. In 2001, Lozano sue Cabrera and Vasquez under the ADA.

The present lawsuit has its genesis in a 2001 lawsuit Lozano filed in March 2001 against, among others, these same Defendants (that is, Cabrera and Vasquez). In his March, 2001 lawsuit against, among others,

Defendants Julio Yee Cabrera and Enrique Vasquez (in the United States District Court, Southern District of California, the action designated as Case No. 01 CV 0395 W (POR)), Lozano asserted causes of action for violation of the Americans With Disabilities Act (“ADA”), the California Unruh Act, and the California Disabled Persons Act, among other common law and California statutory claims. (See Defendants’ Exhibit “A,” Plaintiff Lozano’s March 6, 2001 Complaint).

In his 2001 Complaint, Lozano *alleged*, among other things, that he is physically disabled; that he had traveled to a “public accommodation” owned and/or operated by Defendants Cabrera and Vasquez at 640 S. Imperial Ave., Calexico, California; and that once there, he purportedly found there was no ADA-compliant “van accessible” disabled parking with adjacent access lane for him to use. Lozano contended that the lack of ADA-compliant disabled parking and adjacent access lane was a violation of the ADA, the California Unruh Act, and that California Disabled Persons Act. (Defendants’ Exhibit “A,” Plaintiff Lozano’s March 6, 2001 Complaint, ¶¶ 1, 5, 6, 8-14; more generally, ¶¶ 15-25).

On or about March 6, 2001, Defendants Cabrera and Vasquez filed their Answer to Lozano’s Complaint. (Defendants’ Exhibit “B,” Defendants Cabrera and Vasquez’ March 6, 2001 Answer).

B. The parties settle Lozano’s 2001 lawsuit.

In July and August, 2001, Plaintiff Lozano and Defendants Cabrera and Vasquez signed a “Settlement Agreement” resolving Lozano’s 2001 lawsuit. In that Settlement Agreement, the parties agreed that the Defendants had *already* resolved the injunctive relief portion of the case by installing an ADA-compliant “designated disabled parking space” and

1 access aisle. (Defendants' Exhibit "D," July/August 2001 Settlement
2 Agreement).

3 Thus, as of July/August, 2001 Plaintiff Lozano agreed the subject
4 property had ADA-compliant disabled parking. On the basis of
5 Defendants' payment to Lozano of a monetary sum and Defendants'
6 installation of disabled parking on the Calexico property, the parties settled
7 Lozano's 2001 lawsuit, with Lozano dismissing the Action. (Defendants'
8 Exhibit "D," July/August Settlement Agreement, ¶¶ 3-5).

9 On or about September 18, 2001, the Federal District Court judge
10 overseeing that case signed and entered a "Stipulation for Dismissal" of
11 Plaintiff Lozano's 2001 lawsuit against Defendants. (Defendants' Exhibit
12 "C," September 18, 2001 "Stipulation for Dismissal" Order). That
13 "Stipulation for Dismissal" Order included a "continuing jurisdiction"
14 provision stating:

15
16 "The Court shall *retain jurisdiction* over *all disputes* between
17 (*among*) the parties *arising out of the settlement agreement*,
18 including *but not limited to* interpretation and enforcement of the
19 terms of the settlement agreement."

20 (Emphasis added) (Defendants' Exhibit "C," September 18, 2001
21 "Stipulation for Dismissal" Order).

22
23 **C. Lozano ignores the "continuing jurisdiction" clause in the**
24 **2001 Settlement Agreement, and in 2014 sues the same**
25 **Defendants a second time for the same purported ADA**
26 **violation.**
27
28

1 In February, 2014, Plaintiff Lozano filed his Complaint against
2 Defendants Cabrera and Vasquez¹ in the present lawsuit. Just as in his
3 2001 Complaint, Lozano asserts causes of action against Defendants for,
4 among other claims, violation of the ADA, violation of the California Unruh
5 Act, and violation of the California Disabled Persons Act, and negligence.
6 (See Defendants' Exhibit "F," Lozano's February 2014 Complaint).

7 Just as with his 2001 Complaint, Plaintiff Lozano alleges in his 2014
8 Complaint that he is physically disabled, that he visited Defendants'
9 Calexico commercial property, and that at the time of his alleged visit (in
10 June, 2012), the parking lot on that property did not have any ADA-
11 compliant disabled parking or access aisle, in violation of the ADA, the
12 California Unruh Act, and the California Disabled Persons Act. (See
13 Defendants' Exhibit "F," 2014 Lozano Complaint, ¶¶ 1, 3, 8-13, and more
14 generally, ¶¶ 14-25).

15 Lozano's allegations are false. In June, 2012 Defendants *did* have
16 disabled parking on the subject property, a fact Defendants informed
17 Lozano's attorneys of when, on April 10, 2014, William A. Adams
18 (Defendants' current attorney) provided a photo to Plaintiff Lozano's
19 attorneys of the disabled parking space. (Adams Decl., ¶ 8-10; see Exh. E,
20 April 10, 2014 photo of subject parking space).

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25 1 Plaintiff also names Defendants' tenant, Beamspeed, LLC, as a
26 Defendant in his 2014 lawsuit, but failed to serve Beamspeed with the
27 Summons and Complaint for nearly 10 months, and then not until
28 Defendants advised Lozano that they would not negotiate a settlement
without Beamspeed's appearance and presence as a party in the present
Action.

D. Lozano and his attorneys ignore Defendants' requests for compliance with the 2001 Order of continuing jurisdiction and withhold a copy of the 2001 Settlement Agreement.

After Lozano served Defendants with the Summons and Complaint, William A. Adams, Defendants' current attorney, and Phyl Grace, one of Plaintiff Lozano's Attorneys, held preliminary settlement discussions. (Adams Decl., ¶ 13).

During the same period of time, Defendants' attorney (Adams) learned of the existence of the 2001 access lawsuit filed by Lozano against the same Defendants and obtained a copy of the above-referenced Order from the 2001 lawsuit in which that court retained continuing jurisdiction. However, after a diligent search, Defendants and their attorney were unable to obtain a copy of 2001 Settlement Agreement that was the subject of the 2001 Order by the trial court. (See Adams Decl., ¶ 20-22).

On April 11, 2014, Adams emailed to Plaintiff's counsel Phyl Grace a copy of the Order setting forth the Court's continuing jurisdiction, and requested assistance in obtaining a copy of the settlement agreement. Adams informed Grace that Plaintiff Lozano's 2014 lawsuit was in violation of the 2001 Stipulated Order allowing the court overseeing Lozano's 2001 lawsuit to maintain continuing jurisdiction over the parties and their settlement. Grace failed to respond to Adams' request for assistance in locating the settlement agreement. (Adams Decl., ¶ 15-16; see Exh. C, 2001 "Stipulation for Dismissal" Order; see Exh. H, April 11 and 13, 2014 email exchange between attorneys Adams and Grace).

There were further communications between attorneys Adams and Grace. On April 22, 2014, Attorney Grace asserted in an email that she would not lower the settlement demand because Defendants had been unable to produce the settlement agreement. Accordingly, on April 23,

2014, Adams again requested by email that Attorney Grace search her records for a copy of the settlement agreement. Again, Attorney Grace failed to acknowledge the request. (Adams Decl., ¶ 18; See Exh. K, April 22, 2014 Grace email to attorney Adams).

On April 25, 2014, Adams emailed the partners of the firm representing Plaintiff Lozano --- Mark Potter and Russell Handy --- to, among other things, confirm that they had looked for the settlement agreement. Again, there was no response to the email. Additionally, between April 23rd - 30th, Defendants' attorney (Adams) called Potter and/or Handy at least 4 times, without reaching them or receiving a return telephone call, despite leaving voicemail messages. (Adams Decl., ¶ 24-27, Exh. M, email exchange between Adams and Lozano's attorneys of April 11, 2014, April 23, 2014 and April 25, 2014).

On April 30, 2014, Adams counsel spoke by phone with Grace. Adams again protested Grace's lack of cooperation in obtaining a copy of the settlement agreement. (Adams Decl., ¶ 18). Immediately after the phone conversation, Adams sent Grace a letter complaining about her handling of the case, including her refusal to respond to Adams' repeated requests for assistance in obtaining the settlement agreement. (Adams Decl., ¶ 29-30). Adams followed that up by sending attorney Potter a letter complaining about his firm's handling of the lawsuit, and informing him that Adams had begun work on a motion to dismiss. (Adams Decl., ¶ 30-31; Exh. N, Adams email to Potter of April 30, 2014).

That same evening (April 30, 2014), attorney Potter replied to Adams by email, attaching the long sought copy of the 2001 Settlement Agreement. (Adams Decl., ¶ 33; Exh. O, Potter April 30, 2014 email to Adams). He also, for the first time, substantively discussed the settlement agreement's applicability to the case. In his email, Potter argued:

“Section 3 of that Agreement states, merely, that: “the Parties stipulate and agree that Defendants have made the following improvements” And that was entirely accurate. The fix was done. Unfortunately, your client did not covenant to maintain the property. Thus, your clients are not in violation of the Agreement by letting the property go and letting the accessible parking space fall into such disrepair that it no longer functions as such. We cannot claim (and have not claimed) breach of the Agreement. Nor do we have a basis for having the Court “enforce” anything. All terms were complied with.” (Exh. O, Potter’s April 30, 2014 email to Adams).

Thereafter, Defendants’ counsel was forced to defend the case on the merits, including preparation and filing of a motion to dismiss, based on, among other things, the Court’s 2001 Stipulation for Dismissal Order resolving Lozano’s 2001 ADA lawsuit against Defendants. (Adams Decl., ¶ 35).

LEGAL STANDARD

A. Rule 11 prohibits frivolous pleadings or pleadings presented for any improper purpose.

Federal Rule of Civil Procedure §11 (b) requires that in all pleadings filed with the court, “it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation” and that “the claims, defenses, and other legal contentions are warranted by existing law or by a non-frivolous argument

1 for extending, modifying, or reversing existing law or for establishing new
2 law.”

3 Rule 11 is a purely objective standard, and a violation “might be
4 caused by inexperience, incompetence, willfulness, or deliberate choice.”
5 (*Cruz v. Savage*, 896 F.2d 626, 633 (1st Cir. 1990)). A party violates Rule
6 11 when it is “attorney was in a position to know the [party’s] claims were
7 unsupported by fact or law prior to bringing the claims and throughout the
8 litigation.” (*Id.*). Both a party and the party’s attorney can be sanctioned
9 for violating Rule 11. (FRCP, Rule 11 (c) (1); see *Collins v. Walden*, 834
10 F.2d 961, 965-966 (11th Cir. 1987)).

11 LEGAL ARGUMENT

12 **A. The conduct of Lozano and his attorneys was for the improper** 13 **purpose of harassing Defendants to cause unnecessary delay,** 14 **or to needlessly increase the cost of litigation, to use as** 15 **leverage to obtain an unmerited monetary settlement.**

16 The issue of whether or not Lozano’s lawsuit violates the 2001
17 Stipulated Order providing the court overseeing Lozano’s 2001 lawsuit
18 against the same Defendants with continuing jurisdiction to resolve any
19 disputes arising from the settlement of that case is the subject of
20 Defendants’ pending Motion to Dismiss. It is based on a plain language
21 reading of the 2001 Stipulated Order.

22 Lozano’s attorney (Mark Potter) argued in an email to Adams that
23 the 2001 court did not maintain continuing jurisdiction to resolve disputes
24 concerning the terms of the 2001 Settlement Agreement because
25 Defendants purportedly did not agree to continue to maintain the ADA-
26 compliant nature of the disabled parking space and access lane. In so
27 doing, Potter implicitly admitted the importance of the 2001 Settlement
28

1 Agreement, which his firm had withheld from Adams up until that time, in
2 determining whether his client's present claims were covered by the
3 continuing jurisdiction of the 2001 court. While Defendants dispute this
4 interpretation, in so arguing, Potter ignores language in the Stipulation for
5 Dismissal allowing the Court overseeing the 2001 lawsuit which states that
6 the 2001 court's continuing jurisdiction is "not limited to enforcement of the
7 settlement agreement," but includes "all disputes arising out of the
8 settlement agreement." (See Exh. O, Potter April 30, 2014 email to
9 Adams).

10 Regardless, because that issue will be decided by a separate motion
11 currently pending before this Court, it need not be re-argued here in
12 significant detail. However, the fact that the plain language of the 2001
13 Court's Stipulated Order applied to the present case, coupled with the
14 following aggravating factors, leads to the conclusion that issuance of Rule
15 11 sanctions against Lozano and his attorneys are warranted.

16 **B. Aggravating factors.**

17 In addition to the primary improper conduct discussed above, the
18 conduct of Lozano's attorneys has been set against a backdrop of
19 additional questionable conduct, as well as the unusual hardship of
20 Defendants.

21 **1. Lozano's attorneys are evading new California state law and are**
22 **engaging in just the sort of abusive conduct targeted by the**
23 **new law.**

24 In 2012, California Senate Bill 1186 was signed into law to curb
25 abuse of the State's Unruh Act and Disable Persons Acts, i.e., California
26 Civil Code §§52 and 54.3. (See the annotations to California Code of Civil
27 Procedure §425.50). Among other things, the new law requires that
28 plaintiffs personally verify their complaints and plead facts about the

1 alleged violation with specificity and clarity. (California Code of Civil
2 Procedure §425.50).

3 Rather than complying with the new law, Plaintiff Lozano and his
4 counsel are filing their access lawsuits in Federal District Court. They are
5 not complying with the minimally burdensome (at least for plaintiffs with
6 bona fide injury) verification requirement. However, they still seek the
7 monetary damages provided by state law. Moreover, Plaintiff Lozano and
8 his counsel are utilizing these evasive tactics to engage in the precise
9 conduct which the California legislature sought to eliminate: sloppy and
10 inaccurate pleading, which leads to much confusion, distress, and
11 unnecessary defense costs.

12 When coupled with the blatant inaccuracy of Plaintiff Lozano's
13 contention in his 2014 Complaint that at the time of his June, 2012 visit to
14 Defendants' Calexico commercial property that there was neither a
15 disabled parking space nor an access aisle, it is obvious that Lozano's
16 attorneys "do not have the time" (to use Potter's words) to draft complaints
17 that are factually accurate, in violation of California state statutory law that
18 now requires the accuracy of such access discrimination complaints be
19 assured through the plaintiff's verification.

20 **2. Lozano's attorneys have engaged in unnecessary delay and**
21 **harassment.**

22 Lozano's attorneys initially demanded \$6,000 to settle the case.
23 (Adams Decl., ¶ 13). On April 11, 2014 (via email), Adams sent a copy of
24 the Stipulated Order for continuing jurisdiction and requested assistance in
25 locating a copy of the settlement agreement. (Adams Decl., ¶ 15; Exhibit
26 C, September 18, 2001 Stipulated Dismissal Order; Exhibit G, Adams April
27 11, 2014 email to Grace). Grace responded only with an evasive new
28 theory for their case (conceding the complaint language to be inaccurate.

(Exhibit H, Grace April 13, 2014 email to Adams).

Adams made at least two more requests for the 2001 Settlement Agreement by email. Again, each of these requests were ignored. (Exhibits K and L, Adams emails to Lozano's attorneys of April 23 and April 25, 2014; Adams Decl., ¶ 24-25).

It was not until April 30, 2014, when Adams more vigorously protested the stonewalling by Lozano's attorneys concerning their failure to produce the 2001 Settlement Agreement, that Lozano's attorneys finally responded to Adams' request, finally providing a copy of the 2001 Settlement Agreement. (Exhibit M, April 30, 2014 email from Potter to Adams). However, the response was coupled just hours later with a transparently retaliatory withdrawal of the \$6,000 settlement demand and its replacement with a new \$12,000 settlement demand. (Exhibit O, April 30, 2014 email from Grace to Adams).

During this delay or concealment of the settlement agreement, attorney Grace refused to engage in meaningful discussion regarding the facts of the case. (Adams Decl., ¶ 28).

Early in the lawsuit, Adams provided Grace with a photograph of the disabled parking space. Grace acknowledged that the factual allegations in the Complaint (that there was no disabled parking space or access aisle) were inaccurate (stating that she relied on a photo that was allegedly taken in the rain). (Adams Decl., ¶ 9-11; Exh. E, April 10, 2014 photo of subject parking lot). However, Grace substituted a transparently evasive and frivolous alternate theory for the lawsuit, i.e., that "the [ADA] requirements have changed since 2001 and what may have been compliant in 2001 is different than what is required today." Grace never specified what purported change in ADA regulations applied to this parking space. (Adams Decl., ¶ 9-14). In any case, the 2010 changes to the ADA

1 regulations expressly state that “facilities or elements” in existence and
2 compliant before 2010 do not have to be upgraded to the new
3 requirements. (Adams Decl., ¶ 13; 28 CFR 35.15(c)(5)).

4 Mark Potter, a partner attorney representing Lozano in this 2014
5 lawsuit, later discarded Grace’s “2010 ADA regulations changes”
6 argument, but only after his firm doubled Lozano’s settlement demand in
7 obvious retaliation for Adams’ demands for a meaningful discussion of the
8 merits of the case and for a copy of the 2001 Settlement Agreement.
9 (Adams Decl., ¶ 14).

10 **3. Hardship.**

11 Defendants Cabrera and Vasquez are 81 and 86 years old,
12 respectively. They are on very limited incomes: primarily social security
13 and the rents from partial interests in a few small properties. The affairs of
14 the two gentlemen, with respect to the property, are handled by Cabrera’s
15 daughter and son in law, Linda and John Muren, with the assistance of a
16 property management firm. (Adams Decl., ¶ 36).

17 Muren is undergoing treatment for a particularly aggressive and
18 metastasized form of breast cancer. Moreover, her husband, John Muren,
19 is on dialysis. The lawsuit has been particularly stressful on all of these
20 individuals. (Adams Decl., ¶ 36).

21 In contrast, Plaintiff Lozano, it is fair to say, suffered no real
22 cognizable injury. His Complaint does not allege that he could not find
23 parking at Defendant’s property; it does not allege that he could not use
24 his van lift, or that he could not access the Beamspeed store. (See
25 Complaint). In fact, Grace, one of Lozano’s attorneys, conceded to Adams
26 the inaccuracy of the Complaint’s allegation that there was no van
27 accessible parking. Plaintiff and his counsel’s unreasonable and improper
28 conduct in this action have caused Defendant’s much stress and expense,

1 and have exhausted the funds originally available for settlement of this
2 lawsuit.

3
4 **CONCLUSION**

5 The foregoing conduct, taken as a whole, demonstrates that Lozano
6 and/or his attorneys were not conducting themselves pursuant to a good-
7 faith belief that they were not violating the 2001 Stipulated Order providing
8 the court overseeing Lozano's 2001 lawsuit against the same Defendants
9 with continuing jurisdiction to resolve any disputes arising from the
10 settlement of that 2001 case. Rather, the above-reference conduct by
11 Lozano and his attorneys evidenced an intent to "harass, cause
12 unnecessary delay, or needlessly increase the cost of litigation" so as to
13 extract an unwarranted monetary settlement from Defendants. Such
14 conduct violates FRCP, Rule 11, and warrants issuance of sanctions
15 against Lozano and/or his attorneys in an amount this Court determines
16 appropriate, fair and just, given the circumstances of this case.

17 Consequently, Defendants Julio Yee Cabrera and Enrique Wong
18 Vasquez respectfully request this Court issue an order granting
19 \$30,305.00 in sanctions against Plaintiff Enrique Lozano and/or his
20 attorneys, or in an amount this Court concludes is fair and just.

21
22 Date: September 26, 2014

NORTON MOORE & ADAMS LLP

23
24
25 By: s/William A. Adams
26 William A. Adams
27 Attorneys for Defendants Julio Yee
28 Cabrera and Enrique Wong Vasquez